No. 257.

FILED
APR 13 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Dillon (Filed) O. E.

Supreme Court of the United States.

Filed April 13, 1901.

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY,
Plaintiff in Error,

vs

THE STATE OF OHIO, *ex rel.* ATTORNEY GENERAL,
Defendant in Error.

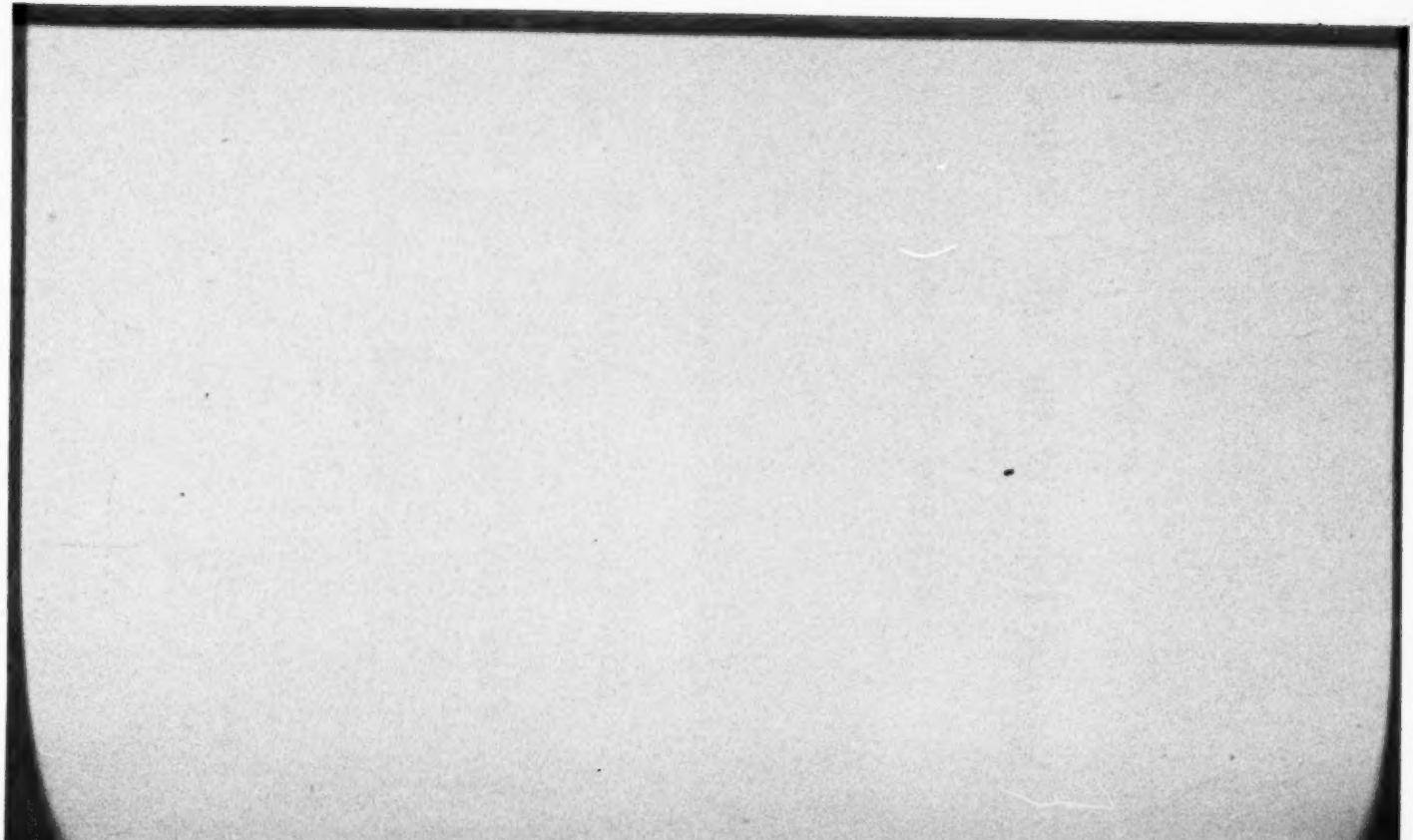
IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief for Defendant in Error.

EDMOND B. DILLON,
Of Counsel.

JOHN M. SHEETS,
Attorney General of Ohio.

CHAMPLIN PRESS, 74 E. GAY ST., COLUMBUS, O.



9683

(17,727)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY,
Plaintiff in Error,

vs

THE STATE OF OHIO, *ex rel.* ATTORNEY GENERAL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief for Defendant in Error.

EDMOND B. DILLON,
Of Counsel.

JOHN M. SHEETS,
Attorney General of Ohio.

9634

(17,727)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF OHIO, *ex rel.* ATTORNEY GENERAL,
Defendant in Error,

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief for Defendant in Error.

JOHN M. SHEETS,
Attorney General of Ohio.

EDMOND B. DILLON,
Of Counsel.

STATEMENT.

Plaintiff in error is an Ohio corporation, created under the laws thereof on June 27, 1893.

Its charter authorized it to manufacture and sell oleomargarine.

On April 12, 1898, the State of Ohio, through its attorney general filed a petition in quo warranto in the Supreme Court of Ohio (Record, p. 1) which petition in quo warranto contains four charges of wilful violation of as many Ohio laws.

Upon issue made, the said Court heard the evidence (no evidence being offered by the defendant), and on April 10, 1900, found as a matter of fact that said charges were true (Record, p. 15.)

Thereupon the Supreme Court of Ohio entered a judgment of ouster against said corporation (Record, p. 15).

By the assignment of errors filed herein (Record, p. 28), the said corporation claims five errors, the first four errors assigned being that each of the four Ohio Statutes which it had transgressed, was in violation of and repugnant to the Constitution of the United States, while the fifth error assigned is, that the proceeding in quo warranto itself was in contravention of the Constitution of the United States.

Three of these Statutes regulate the sale of oleomargarine, and are of the same general character and will be discussed under one head. The other two errors will be discussed under separate heads.

The decision of this case below wil be found in full in the case of The State of Ohio, ex rel, Attorney General vs. The Capital City Dairy Company, 62 O. S., 350.

THE THREE STATUTES REGULATING THE MANUFACTURE AND SALE OF OLEOMARGARINE.

As these Statutes regulating the manufacture and sale of oleomargarine must stand or fall together, we shall consider them all together.

The first Statute which the Supreme Court of Ohio finds that this corporation continuously violated, is one which forbids the manufacture or sale of any article which is in imitation or semblance of natural butter, or which is not in a separate or distinct

form such as would advise consumers of its real character. This act in full is as follows:

"(4200-13.) No person by himself or his agent, or his employe, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same, nor compound with or add to milk, cream or butter, any acids or other deleterious substance, or animal fats, or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale or offer for sale, any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such an article, substance or compound shall be made or produced in this State or elsewhere."

(4200-14.) "For the purpose of this act, the terms 'natural butter and cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms butter and cheese, and which butter is manufactured exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter, or other ingredient causing it to look like or to appear to be butter, as above defined."

(Act of March 7, 1890. 87 Ohio Laws, 51.)

The second Statute which the Supreme Court of Ohio found the defendant guilty of continuously violating, is one to prevent the manufacture or sale of oleomargarine which contained any artificial coloring matter. This act in full is as follows:

(4200-16.) "No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or

deliver, any oleomargarine which contains any methly (methyl) orange, butter yellow, annatto, analine dye, or any other coloring matter." (Act of May 16, 1894. 91 Ohio Laws, 274.)

The third act which the Supreme Court of Ohio found the defendant guilty of continuously violating, forbids the selling of any substance having the semblance of butter, unless done under its true name, and that each roll thereof be durably painted, stamped, stenciled or marked. The Statute in full is as follows:

(4200-30.) "That no person shall sell, expose or offer for sale or exchange, any substance purporting, appearing or represented to be butter or cheese, or having the semblance of either butter or cheese, which substance is not made wholly from pure milk or cream, salt and harmless coloring matter, unless it is done under its true name, and each vessel, package, roll or parcel of such substance has distinctly and durably painted, stamped, stenciled or marked thereon the true name of such substance in ordinary bold-faced capital letters, not less than five-line pica in size, and also the name of each article or ingredient used or entering into the composition of such substance, in ordinary bold-faced letters not (less) than pica in size, or sell or dispose of in any manner to another, any such substance without delivering with each amount sold or disposed of, a label on which is plainly or legibly printed in ordinary bold-faced capital letters not less than five-line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk, or cream, salt and harmless coloring matter; and the words 'butter,' 'creamery,' or 'dairy,' or any word or combination of words embracing the same shall not be placed on any vessel, package, roll or parcel containing any imitation dairy product or substance not made wholly from pure milk or cream, salt and harmless coloring matter."

(First Section of the Act of March 21, 1887, 84 Ohio Laws, 182.)

The Supreme Court of Ohio by its judgment (Record, p. 15) finds that the charges in the petition against the said corporation, that it had wilfully and persistently violated the foregoing Statutes, were true, and the only question now remaining, is whether

all of these Statutes are repugnant to the Constitution of the United States, since the judgment below must be affirmed if even one of them be valid.

The real question presented in attacking the constitutionality of these Statutes is simply this: "Has the Legislature of the State of Ohio the power to enact Statutes *regulating* the sale of oleomargarine?"

No question of interstate commerce can possibly arise herein, since this was an Ohio corporation, manufacturing its product in Ohio, and in answer to the above question therefore, we say that not only has the Legislature of Ohio the power to enact Statutes *regulating* the sale of oleomargarine, but going a step farther, it has full power, if it should wish to exercise it, to prohibit the manufacture and sale of oleomargarine in that State altogether.

Turning our attention for a moment to the history of oleomargarine, the Court will observe from the decisions hereinafter quoted that its entire history covers comparatively but a few years, so that no ancient rights or privileges have attached to this article as an article of food, but on the contrary its history from the beginning, has been one of regulation.

Oleomargarine was invented by a French chemist in about the year 1871, being first supplied to the soldiers in the French Army in the Franco-Prussian War, as a substitute for butter. Its growth was at first slow, and it was received with great caution, and in all parts of Europe under Statutory regulation. During the past ten or fifteen years it has rapidly spread throughout the United States and in the State of Ohio. As originally manufactured no milk or cream was used as an ingredient, but the substance was composed exclusively of fats from beef and pork. Its natural color is almost white. In fact although thousands of dollars have been expended in experiments, it has been found abso-

lutely impossible to make oleomargarine possess any other natural color than white. When it entered into the State of Ohio, therefore, two things were open to the Legislature. Either to prohibit it altogther as is done in some other States in the Union, or to regulate it. We can easily conceive how humbly oleomargarine knocked at the doors of this State for admission and how emphatically it promised that if admitted into this State, it would in no wise offend against its laws, and would scrupulously keep on its own territory ,and that a person desiring to distinguish between oleomargarine and buter woudl have no more difficulty, than would a person desiring to distinguish between milk and cider.

The Legislature of this State at first, by the Act of May 17, 1886 (83 Vol. 178—Bates', 4200-32) practically prohibited the manufacture of any substitute for butter whatever, but by the Act of March 21, 1887, (4200-30) the manufacture and sale was permitted, providing *each roll* was distinctly and durably stamped with the true name of such substance in bold-faced capital letters. And further amendment then follows in the Act of 87 Vol. 151 (Bates', 4200-13), where the manufacture of any article in imitation or semblance of natural butter was absolutely prohibited with the one proviso contained in Section two of that Act (Bates', 4200-14), which provides that oleomargarine may be manufactured "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient, causing it to look like, or appear to be butter."

And later, the Legislature (91 O. L. 274) (Bates', 4200-16) absolutely prohibits the manufacture or sale of oleomargarine *which contains any coloring matter.*

In order to aid still further in keeping butter and oleomargarine at all times absolutely separate and distinct, so that the

doors of fraud and deception might be closed even tighter (since there are certain seasons of the year when the natural color of butter approaches white, and therefore oleomargarine at such times would be absolutely prohibited from selling at all) it was provided in said Acts that the manufacturers of butter might use a harmless coloring matter. With these Acts in force, butter would be always white, and the opportunities to deceive in the sale thereof were reduced to a minimum.

By what special right or privilege then do the manufacturers of oleomargarine claim that these laws regulating their product, are unconstitutional? If they sell a product which is not in semblance or imitation of butter, they violate no law. Indeed the contention in this case on the part of the Plaintiff in Error should be, not that these Acts are unconstitutional, but that it is unconstitutional to prevent them making an article in imitation and semblance of another article.

Indeed the main point attempted to be established in this whole case by the Plaintiff in Error is that it should be permitted to imitate another article so closely that it is absolutely impossible except by chemical analysis to determine it from such article, and therefore if their contention be good in this case, such a rule must apply to each and every other manufacturer desiring to make an article in imitation of another. Indeed the Plaintiff in Error in this case, if successful, would establish authority for food manufacturers to violate that most common of Statutes found in almost every State, and copied from the English Statute, which provides that an article shall be deemed adulterated if it is an imitation of another article; or similar Statutes where it is provided that an article shall be deemed to be adulterated "if it is colored whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is."

The necessity of these laws for the prevention of fraud, is readily apparent to the Court.

The object of the Legislature is to close the door of fraud to unscruplous dealers. The difference in price between butter and oleomargarine is so great that the Legislature did a wise thing when it attempted to take away such a temptation from unscrupulous dealers.

The question as to the constitutionality of these laws has been raised and settled in the State of Ohio in the case of Palmer vs. the State, 39 O. S. 236. The decision of the Court in that case is brief, and as it discusses the very questions raised here so succinctly, we quote it in full:

"Upson, J. John Palmer was convicted in the Police Court of the City of Cleveland, of selling twenty-seven packages of a substance having the semblance of butter, but not made wholly from pure cream or pure milk, and the packages not having painted, stamped or marked thereon the name of each article used or entering into the composition of the substances thus sold, in violation of the provisions of Section 7090 of the Revised Statutes. Upon this conviction, Palmer was sentenced to pay a fine of fifty dollars and costs. The judgment of the Police Court was, on error, affirmed by the Court of Common Pleas, and the judgment of the latter Court was affirmed by the District Court. Palmer now asks leave to file a petition in error to reverse the judgment of the District Court.

"The defense made in the Police Court was founded upon the fact, which is shown by the record, that the substance sold by Palmer, was manufactured under letters patent issued by the United States, and it is claimed that the section under which Palmer was convicted, so far as it applies to articles protected by such letters patent, is in conflict with the Constitution and laws of the United States, and is therefore void.

"The Constitution of Ohio provides that private property shall ever be held inviolate but subservient to the public welfare, and in vesting the legislative power of the State in the General Assembly, full power is given, by the Constitution, to enact such judicious and reasonable laws, as, in the judgment of the Legislature, may be necessary for the purpose of preventing any person from using his own property or rights in such a way as to injure the community or individuals. This general power is subject only to the limitations imposed by the Constitution of the State, or that of the United States, and within it is clearly included the right to regulate or forbid the sale of property to any extent that may be necessary to promote the public welfare.

"It was, therefore, within the undoubted power of the Legislature to prohibit the sale of substances having the semblance of butter or cheese, but not wholly made from pure cream or milk, unless each package of such substance should have painted, stamped or marked thereon, in the manner prescribed by the statute, the name of each article used in, or entering into the composition of such substance; and this power is possessed by the Legislature over the sale of articles protected by letters patent as well as of those not thus protected.

"The patent laws of the United States give to inventors the exclusive right to their inventions, but do not give to them the right to disregard laws enacted to promote the welfare of the whole people. The State cannot discriminate against patented articles by imposing upon their sale conditions and restrictions not placed upon the sale of other similar articles; but the sale of all articles like those now under consideration, whether patented or not, may be restricted, regulated or forbidden, whenever the public good requires such restriction, regulation or prohibition.

"These principles have been recognized and illustrated in a number of cases decided by this Court, and by the Supreme

Court of the United States. Among the leading cases are Jordan vs. Overseers of Dayton, 4 Ohio 295; State ex rel. vs. Telephone Co., 36 Ohio St. 296; Patterson vs. Kentucky, 97 U. S. 501; and Webber vs. Virginia, 103 U. S. 344.

"It is claimed, however, that laws regulating the sale of patented articles can be sustained only when they come fairly within the police powers of the State; that those powers extend only to regulations relating to the health, morals, good order and comfort of the people, and that the provisions of Section 7090 are merely intended to prevent fraud. The language of the Act supplementary to Section 7090, passed April 26, 1881, shows very plainly that the design of the Legislature in passing Section 7090, as well as the supplementary section, was to prevent the sale of impure and unwholesome food, and that both sections, therefore, come within the most narrow definition of police regulations. If it were conceded, however, that none of the substances described in Section 7090 are positively injurious to health, we hold that the law is within the general powers possessed by the State. Those who buy food have a right to know what they buy, and to have the means of judging for themselves as to its quality and value."

We quote from the 17th volume (First Edition) of the American and English Encyclopædia of Law, page 180:

"The Legislature has the power to enact laws to prevent a similated article of butter from being put upon the market in such form and manner as to be calculated to deceive. Such a law is the valid exercise of police power by a State, and is not a violation of the United States Constitution."

And a similar Statute to our own, i. e., forbidding the manufacture of oleomargarine in semblance of butter, is declared valid and constitutional in the case of Butler vs. Chambers, 36 Minn., 69. The discussion of this subject in that case is so learned that

we invite the Court's attention to the case without excerpting therefrom.

To the same effect is the case of McAllister vs. State, 72 Md., 390; and also the case of State vs. Newton, 50 N. J. L., 534.

It is held in case of Cook vs. State, 110 Ala., 40, that evidence that the oleomargarine sold by defendant was of the color of yellow butter ,is sufficient to sustain a finding that "A Statute prohibiting the sale of imitation butter, unless colored pink, has for its object the prevention of fraud on the public in the sale of provisions, and is, therefore, within the purview of the police powers of the State."

The Ohio laws do not seek to compel oleomargarine to disgrace itself by taking on a pink color, nor do they seek prohibition of its sale. Their sole object is a reasonable regulation.

"It being within the constitutional power of the Legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the Legislature to determine what regulations are needed for that purpose."

Cooley Const. Lim (3d Ed.) 168.

In People vs. Arensberg, 105 N. Y., 123, this subject is thoroughly discussed. In that case Arensberg was convicted of violating Section 7 of Chapter 183, of the laws of 1885, entitled: "An Act to prevent deception in the sale of dairy products."

That section prohibits: First, the manufacture out of any animal fat, or animal or vegetable oils, not produced from unadulterated milk or cream from the same, of any product in imitation or semblance, or designed to take the place of natural butter. Second, mixing, compounding with or adding to milk, cream or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter. Third, selling, keeping or offering for sale any such prohibited article.

In that case it was contended as it is here, that the Statute was in violation of the Constitution, and subversive of defendant's constitutional rights of liberty and enjoyment of property, etc.

The Court without dissent, holds this legislation to be valid and constitutional. Discussing this question the Court says (p. 129): "Assuming as is claimed, that butter made from animal fat or oil is wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fats or oils, have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the Legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is and upon its own merits, and are not entitled to the benefit of any additional market value, which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for another."

In the case of Commonwealth vs. Huntley, 156 Mass., 236, it is held as follows (4th syllabus):

"The enactment of a statute which forbids the manufacture and sale of oleomargarine which is made in imitation of yellow butter is a valid exercise of the police power which remains in the several States, though such oleomargarine has been imported from another State; and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several States."

In State vs. Horgan, 55 Minn., 83, the Court discussing legislation regulating manufacture and sale of oleomargarine, says (p. 185):

"There is no question whatever of the constitutionality of such legislation."

One of the most important decisions on this subject is the now famous case of Powell vs. Pennsylvania, 127 U. S. 678. This case was ably argued and is later approved by the same Court.

The question in this case was the validity and constitutionality of the Pennsylvania Statutes enacted May 21, 1885, absolutely prohibiting the manufacture or sale of oleomargarine in that State. Compared with which legislation, the laws of Ohio might be considered a free and fertile field of welcome for oleomargarine. Yet the Supreme Court of the United States sustains this prohibitory law as follows (Italics ours):

(1.) "The Fourteenth Amendment to the Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, *the prevention of fraud*, and the preservation of the public morals.

(2.) "The prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk; or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale or having in possession with intent to sell the same, as an article of food, is a lawful exercise by the State of the power to protect by police regulations, the public health."

(3.) "Whether the manufacture of oleomargarine or imitation butter of the kind described in the Act of the Legislature of Pennsylvania of May 21, 1885 (Laws of Penn. of 1885, p. 22, No. 25) is, or may be, conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business, rather than its regulation, in such manner as to permit the manufacture and

sale of articles of that class that do not contain noxious ingredients are questions of fact and of public policy, which belong to the Legislative Department to determine."

(4.) "The Statute of Pennsylvania of May 21, 1885, 'for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof,' neither denies to persons within the jurisdiction of the State the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the Fourteenth Amendment to the Constitution of the United States."

It will be noted in the foregoing case that even the dissenting opinion of Mr. Justice Field, would, nevertheless, sustain the Ohio laws, as he says in conclusion (p. 699):

"The fault which I find with the opinion of the Court on this head, is that it ignores the distinction between regulation and prohibition."

In the case of Schollenberger vs. Pennsylvania, 171 U. S. 1, the Supreme Court of the United States holds that oleomargarine is an article of commerce and that, therefore, the "original package" rule would apply and *to that extent* the act *prohibiting* the sale of oleomargarine in Pennsylvania was invalid. But that holding is not germane to this case since no such question arises. If the Plaintiff in Error were a non-resident manufacturer seeking to sell citizens of Ohio in original packages, we would take up the question and discuss it.

But the Supreme Court in this same opinion, reaffirms the famous case of Powell vs. Pennsylvania, 127 U. S., 678.

Supra, in these words (p. 15) "It is claimed, however, that the very Statute under consideration, has heretofore been held valid by this Court in the case of Powell vs. Pennsylvania, 127 U. S., 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the question was one as to the police power of the State acting upon a subject

always within its jurisdiction." And again (p. 16) "the right of a State to enact laws in relation to the administration of its internal affairs is one thing, and the right of a State to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein, might be held valid as not in violation of any provision of the Federal Constitution, when at the same time, legislation directed toward prohibiting the importation within the State, of the same article manufactured outside of its limits, might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument."

For these same reasons, "upon the principle recognized in the Pennsylvania cases," the pink law of New Hampshire as to outside shippers is held invalid in the case of Collins vs. New Hampshire, 171 U. S., 30.

Another authoritative case on the subject of State regulation of oleomargarine, imported into the State, is found in Plumley vs. Massachusetts, 155 U. S., 461, where it is held that the State Legislature has power to enact a law forbidding the manufacture and sale of oleomargarine. And further that such a statute i. e., "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artifically colored so as to look like yellow butter, *and brought into Massachusetts*, is not in conflict with the clause of the United States Constitution investing Congress with power to regulate commerce among the several States.

And the court further holds that the case of Leisy vs. Hardin, 135 U. S., 100, "is restrained in its application to the case there actually presented for determination, and held not to justify the broad contention that a State is powerless to prevent the sale of

articles of food manufactured in, or brought from another State, and subjects of traffic, or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import."

And therefore the decision in re Worthin 58, Fed. R., 467, which declared the act of March 7th, 1899, Ohio Laws, to be invalid so far as it applied to importers of colored oleomargarine, is no longer authority since it is based on Leisy vs. Hardin, Supra.

THE FOURTH STATUTE.

The fourth Statute, the constitutionality of which is raised herein, is found in Bates' Annotated Ohio Statutes, Section 4200-7, and is follows:

"(4200-7) (SAMPLE MAY BE DEMANDED FOR ANALYSIS.) Every person manufacturing, offering or exposing for sale, or delivering to a purchaser any drug or article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession."

This Statute is a part of the general pure food statutes of Ohio, applying to all food and drugs offered for sale in the State of Ohio. It is purely a local statute, acting upon food products within the State of Ohio which are offered for sale by citizens of that State. No Federal question can possibly be involved in its construction, and the fact that the plaintiff corporation was found guilty of wilfully violating this section, in refusing to give samples for analysis, is of itself sufficient to sustain the decision of the Supreme Court of Ohio, and therefore it would seem immaterial as to the other questions attempted to be raised by counsel for plaintiff in error herein.

This Statute is the basis of the enforcement of all of the laws to prevent adulteration of food and drugs; for without it, it would be an absolute impossibility to enforce the pure food laws. There is no way to determine if food or drugs are adulterated, except by analysis. Individual citizens and purchasers of products cannot for themselves determine this question, nor secure convictions. Therefore if a dealer in adulterated food may sell to consumers and refuse an inspector or other person desiring a sample for analysis, the enactment of all the pure food laws for the prevention of adulteration becomes at once futile and a farce. While a man may do as he pleases with his own, yet the great principle that a private right must always yield for public good is undoubtedly applicable in this case, and no principle of law should be better settled than that the vendor of foods must, for value received, at all times, deliver a sample of his product to any properly authorized person for analysis.

Concerning this Statute, the Supreme Court of Ohio in this case below (62, O. S., 350) says:

"Nor is there any question whatever in regard to the power of the State to compel a sample for analysis of any article of food. It would be a waste of space to argue the matter. We hold that in that particular also the Statute is reasonable and just. Jordan vs. Overseers, 4 Ohio, 295; The State vs. Ruedy, 57 Ohio St., 224. Authorities to the same point are numerous, but not necessary. However, we call attention to a recent utterance of the Supreme Court of the United States in Gunding vs. Chicago, which involved the right of the city to forbid the sale of cigarettes without a license, opinion by Mr. Justice Peckham:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and

unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforcement of the ordinance violates no provisions of the Federal Constitution."

AS TO THE ACTION OF QUO WARRANTO.

The fifth and last error assigned by plaintiff in error is that the proceeding in quo warranto as prosecuted and decided in the court below was in contravention of the Constitution of the United States. This is a very broad and general contention and in the absence of specifications, it would be difficult to anticipate counsel's argument on that point.

It must be apparent, however, that a writ of quo warranto, in addition to its legal significance and scope as determined by the common law and the old Statute of St. Ann, has received special attention, not only by the Constitution of nearly all the States, but at the hands also of the Legislatures thereof.

The proceeding in quo warranto, therefore, under the Constitution and Statutes of Ohio, as considered with reference to an action against a creature of the State, as was the case with this corporation, in so far as the form of the remedy is concerned, must be binding upon the plaintiff in error, and from that interpretation of the highest court of the State, there can be no appeal to this court.

It would be a mere waste of time to cite authorities or reasons for the above conclusion. By the Constitution of the

State of Ohio, Article 4, Section 2, it is provided that the Supreme Court of Ohio shall have original jurisdiction in quo warranto. This jurisdiction was invoked by the Attorney General in the case below. It is provided by statute as follows:

"6760. (WHEN PROCEEDINGS IN QUO WARRANTO MAY BE INSTITUTED AGAINST A PERSON.) A civil action may be brought in the name of the State:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this State, or an office in a corporation created by the authority of this State.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this State without being legally incorporated."

"6761. (WHERE ACTION OF QUO WARRANTO MAY BE BROUGHT AGAINST A CORPORATION.) A like action may be brought against a corporation:

1st. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts.

2d. When it has forfeited its privileges and franchises by non-user.

3d. When it has committed or omitted an act which amounts to surrender of its corporate rights, privileges and franchises.

4th. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in contravention of law."

"6762. (WHO MAY COMMENCE ACTION.) The attorney general, or a prosecuting attorney, when directed by the governor, supreme court, or general assembly, shall commence any such action; and when, upon complaint, or otherwise, he has good reason to believe that any case specified in (the preceding section) can be established by proof, he shall commence an action."

"6780. (JUDGMENT WHEN CORPORATION HAS FORFEITED ITS RIGHTS.) When in any such action, it is found and adjudged that a corporation has, by an act done or

omitted, surrendered or forfeited its corporate rights, privileges, and franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense, or the exercise of such power."

"6781. (APPOINTMENT OF TRUSTEES WHEN CORPORATION DISSOLVED.) The Court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking payable to the State of Ohio, in such sum and with such sureties as the Court may designate and approve, conditioned that they will faithfully discharge their trust and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses."

It is further provided by Section two of Article thirteen of the Constitution of Ohio, that "corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." While corporations formed prior to the adoption of the Ohio Constitution in 1852 might be exempt from legislative control, yet in the case at bar, all the laws of the State of Ohio are a part of the contract between the corporation and the State, and the granting by the State of a charter to this company, and the creation of the same under the general laws of the State of Ohio on the one hand, and the acceptance of the said charter and of the rights, privileges and franchises of the corporation on the part of the plaintiff in error corporation on the other hand, created a compact, whereby the creature thus brought into existence, must hold itself amenable to the methods and means provided by Statute for its proper control and for inquisition into its affairs by the State, and the taking away again of its charter.

The State has no other adequate remedy than the one pursued in this case. A corporation cannot be punished for violating the pure food Statutes. Individuals go to jail and suffer there the personal punishment, and disgrace and humiliation which cannot affect a corporation.

But it is well settled that the granting of relief in civil actions such as quo warranto, is not affected by the fact that there might be a criminal offense committed in the acts complained of. If the defense that the acts complained of in the petition of quo warranto are acts made criminal by the Statutes of Ohio, were a good and valid defense to this action, it would be a sad commentary on law, since in that event, mild offenders only could be punished by quo warranto, and therefore the only object of all corporations desiring to offend against the laws of their creation, would be to commit such offenses as were by Statute not only forbidden, but criminal.

We call attention to the case of Ayres vs. Board, 42 Mich., 422, where it is held that a right to a writ of mandamus is not affected by the fact that a respondent might be punished criminally for the acts complained of.

We apprehend that no one will seriously contend that a corporation created by the laws of Ohio and empowered with certain rights and privileges will be permitted to violate every law it pleases and do so with impunity upon the theory that the only remedy the State has, is to punish it or rather attempt to punish it criminally for such infraction.

The law does not create Frankenstein monsters to roam about upon a grand tour of devastation, and after such creation confess itself powerless to control them any longer. On the contrary, every corporation created by the laws of the State of Ohio, as a condition thereof, agrees to exercise its powers, privileges and franchises strictly in accordance with the laws of

the State, and the same Statutes authorizing their creation also provide for taking away and denying any unauthorized exercise of its power or franchise, and to destroy the corporation itself where the violation of law has been sufficiently flagrant to warrant it.

All the Statutes complained of here were in full force and effect when the plaintiff's charter was granted, and according to well settled Ohio law became a part of its contract with the State. As a creature of the State it is bound by the remedy provided by these Statutes for its control, and therefore all of plaintiff's argument against the form of the action and the remedy applied, was only competent in the State Supreme Court and will not be inquired into here.

This is made the more apparent by an examination of the Constitution of Ohio, adopted in 1852, when it is expressly provided (Art. 13, Sec. 2) that

"Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed."

Therefore all corporations created under this constitution do not have a single, definite and unchangeable contract over which the State is ever after powerless to exercise control or modify, (as in Woodward vs. Dartmouth College, 4 Wheat, 518); but the contract consists of the laws of the State, not only as they are at the time of the granting of a charter, but as the Legislature may from time to time see fit to alter and amend, and Congress can exercise this right. R. R. Co. vs. United States, 99 U. S., 700. And in order that no special or unchangeable contract might be made by the State with any corporation, it was further provided in the Constitution, Art. 13, Sec. 1, that "The General Assembly shall pass no special act conferring corporate powers."

The only contract existing betweeen the State and the plaintiff corporation, therefore, consists of the very laws of which the corporation now complains. Its contention seems to be that these laws were sufficient to create the corporation, but wholly inadequate to control it afterward.

The remedy in quo warranto as administered in this case, therefore, is the identical remedy provided for in plaintiff's contract with the State and it is estopped to complain. The abuse of power by the plaintiff corporation was found by the court to be most flagrant. The Legislature had prohibited the exercise of such acts to its citizens generally, and under the Statutes of Ohio the proceeding in no way deprives the corporation of any of its rights without due process of law. On the contrary there was no penalty or fine attached to the decision and by the decree of the court the only result of the action consists in taking away from the plaintiff company its corporate power and restoring to its stockholders the property pro rata. The establishment against a corporation, before a judicial tribunal in which opportunity for defense is afforded, that its condition is such as to render its continuance in business hazardous to the public or to those who do business with it; that it has exceeded its corporate powers, or that it has persistently violated the rules, restrictions or conditions prescribed by law, constitute sufficient reason for the State which created it, to reclaim the franchises and privileges granted to, and this doctrine is fully supported in the case of Chicago Life Insurance Company vs. Needles, 113 U. S., 575, more fully referred to later herein. And in Ohio it has always been held that where a corporation has deliberately abandoned any salutory rule prescribed by its charter or by the law for the benefit of the public a judgment of forfeiture will be given against it.

State vs. Life Association, 38 O. S., 281.

State vs. Relief Association, 29 O. S., 399.

State vs. Railway Company, 40 O. S., 504.

It is true that there is perhaps a nice distinction between the exercise of a mere corporate power and a corporate franchise. The occasional and mere temporary abuse of a corporate power, might be a matter of complaint only by the stockholders or creditors; but where such abuse has been continued to the extent of involving and injuring public interest, and especially where this abuse consists of a wilful and continued violation of the criminal laws of the State, there can be no question as to the State's power to take action against the corporation by a writ of quo warranto.

And moreover the Statute of Ohio (Bates', Section 6761), which is a part of this corporation's contract, provides that a writ of quo warranto may be brought against it when it has committed any act which amounts to a surrender of its corporate rights, or when it has misused a franchise, privilege or right, or has exercised a franchise, privilege or right in contravention of law. And the Supreme Court of Ohio having found as a fact that this corporation has so committed and exercised such unlawful acts, further consideration of the question could hardly be entertained here.

As stated in the case of State vs. Railroad Company, 47 O. S., 130—

"The corporation has received vitality from the State; it continues during its existence to be the creature of the State; must live subservient to its laws and has such powers and franchises as those laws have bestowed upon it, and none others. As the state was not bound to create it in the first place, it is not bound to maintain it after having done so if it violates the laws or public policy of the State, or misuse its franchises to oppress the citizens thereof. For such offences the State, acting through its Legislature and courts and in the exercise of a sound discretion, may either destroy the corporation entirely by forfeiting its charter,

or oust it from the wrongful exercise of its powers, and if, instead of or in addition to misusing the franchises actually conferred, it usurps others, the circumstances that the usurped franchises relate to and concern commerce between the States, ought not to deprive the State of its visitorial power. If the State creating the corporation is deprived of this power none exists elsewhere."

See also People vs. Rennsalear, etc., R. R. Co., 15 Wend. (N. Y.), 113.

In the case of State vs. Mfg. Co., 40 Minn., 213, it was urged as here that the defendant corporation was entitled to a jury trial, but the Supreme Court of Minnesota, acting under Constitutional provisions and Statutes very similar to those of Ohio, overruled this contention and denied the right.

And it is held in Ward vs. Farmell, 97 Ill., 593, that every private corporation in accepting its charter impliedly undertakes and agrees as a part of its contract with the State that it will so manage and conduct its affairs that it shall not become dangerous to the wellbeing of the public.

And in this same case the court holds: "The Constitutional provisions giving a right to trial by jury was designed simply to secure the right of trial by jury in all tribunals exercising common law jurisdiction, as it had therefore been enjoyed. It was not intended to confer the right in any class of cases where it had not previously existed, nor was it intended to introduce it into special summary jurisdiction unknown to the common law and which do not provide for that mode of trial."

In the case of State vs. Robinson, 44 Mo. App., 86, the defendant corporation was ousted from its charter, the statement (2nd syllabus) being as follows:

"No person or corporation can lawfully engage in this State in the practice of selling intoxicating liquors without a dramshop keeper's license. And if a corporation, organized for the purpose of a club, engage in the practice of selling such liquors to its members without having any license to do so, this furnishes ground for the forfeiture of its corporate franchise."

AN AUTHORITATIVE CASE.

The contentions of plaintiff in error, against the form of this proceeding in the Supreme Court of Ohio, and further that the action itself is in contravention of its rights under the Constitution of the United States, are not new. We call the Court's attention to the case of the Chicago Life Insurance Company vs. Needles, 113 U. S. 574, a case brought in error to the Supreme Court of the State of Illinois. We quote the syllabi in full.

"1st. When the final judgment of the State Court necessarily involves an adjudication of the claim, made therein, that a Statute of the State is in derogation of rights secured to the party by the Constitution, this Court has jurisdiction of the cause in error, although the State Court did not in terms pass upon the point.

2d. A granting of corporate franchises is necessarily subject to the condition that the privileges and franchises conferred, shall not be abused; or employed to defeat the ends for which they were conferred; and that when abused or misemployed, they may be withdrawn by proceedings consistent with law.

3d. A corporation is subject to such reasonable regulations as the Legislature may, from time to time, prescribe, as to the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it.

4th. The establishment against a corporation, before a judicial tribunal in which opportunity for defense is conferred, that it is insolvent; or that its condition is such as to render its continuance in business hazardous to the public, or to those who do business with it, or that it has exceeded its corporate powers; or that it has violated the rules, restrictions or conditions prescribed by law; constitute sufficient reason for the State which created it, to reclaim the franchises and privileges granted to it.

5th. An adjudication by a competent tribunal after full opportunity for defense, that a corporation against which the foregoing grounds have been established, shall no longer enjoy its corporate franchises and privileges, does not deprive it of its property without due process of law, or deny to it, equal protection of the law.

And we would call the Court's attention to the opinion in the foregoing case delivered by Mr. Justice Harlan, and especially to the following:

"We are restricted by the settled limits of our jurisdiction to this specific inquiry, whether the Statutes themselves upon which the judgment below rests, impair the obligation of any contract which the company * * * had with the State or infringe any rights secured by the National Constitution.

Can it be possible that the State which brought this corporation into existence * * * is powerless to protect the people against it, when—assuming as we must the facts to be such as the judgment below implies—its further continuance in business would defeat the object of its creation and be a fraud upon the public and upon its creditors and policy holders?

THE MOTION TO DISMISS OR AFFIRM.

This motion has been reserved for submission at this time, and we respectfully submit with this brief the separate brief prepared in that behalf. It will doubtless be apparent that several of the abuses of which this corporation was found guilty were purely local regulations, not involving Federal questions or rights and were of themselves sufficient to sustain the judgment below; and that other questions raised have already received interpretation in this court, and the judgment below should be affirmed. Respectfully submitted,

JOHN M. SHEETS,
Attorney General of Ohio.

EDMOND B. DILLON,
Of Counsel.